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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VALENTIN GONZALEZ SANDOVAL, Defendant and Appellant.	B198279 (Los Angeles County Super. Ct. No. PA044653)

APPEAL from an order of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Affirmed.

Allen G. Weisberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

On August 24, 2006, we rendered our decision in case No. B175901, a prior appeal in this matter from the judgment entered upon defendant's conviction of possession of cocaine for sale (Health & Saf. Code, § 11351) (prior appeal). Defendant was placed on three years probation with the condition that he spend one year in county jail.[1] We affirmed the judgment, but concluded that the trial court had abused its discretion in failing to provide certain police officer personnel records in response to a *Pitchess*[2] motion. We remanded the matter, directing the trial court to provide defendant with the required discovery and to then conduct a hearing to determine if defendant was prejudiced by the failure to have been provided the material before trial.[3]

Defendant appeals from the order issued after remand, denying his motion for new trial made on the ground that the failure to provide discovery of some personnel records of his arresting officers prejudiced him and entitled him to a new trial. Defendant (1) requests that we review the sealed *Pitchess* material which was disclosed on remand to determine if the trial court abused its discretion in denying his motion for new trial, and (2) contends that the trial court committed reversible error in refusing to allow him to call defense witnesses at trial to impeach the arresting officers, thereby denying him his constitutional rights to confront and cross-examine adverse witnesses and to present a defense.

We affirm.

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1 Defendant's probation has now been terminated and a Penal Code section 1203.4 motion for expungement, by which his guilty verdict was set aside, a plea of not guilty entered and the information dismissed, was granted.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

3 Whether an appellate court finding that there has been a failure to provide required discovery should be remanded to the trial court for a determination of prejudice is currently pending before the California Supreme Court in *People v. Gaines*, review granted November 28, 2007, S157008.

FACTUAL AND PROCEDURAL BACKGROUND

Trial Evidence

We repeat the trial evidence verbatim from our opinion in the prior appeal.

The Prosecution's evidence

On June 12, 2003, at approximately 10:30 p.m., Los Angeles Police Department Officer Jaime McBride and his partner, Officer Adrian Moody, were patrolling the alley behind Schoenborn Street, in the City of Northridge. Officer McBride observed two male Hispanics sitting in a carport talking; defendant, who the officers recognized from prior casual contacts, and a man later identified as Jesus Betancort. Officer Moody had had contact with defendant approximately 10 times in the preceding two months. The carport did not have a pedestrian door, but had a sliding gate which had to be opened for cars to enter or exit.

Officer Moody stopped the patrol car outside of the open carport gate, and Officer McBride exited and walked toward defendant. Defendant stood up, casually placed a leather glove he was holding on a shelf behind him and walked towards the officer. As Officer McBride spoke with defendant, Officer Moody walked to where defendant had been sitting in the carport and saw the open end of the glove facing him. Inside, he observed a white powder, which appeared to be cocaine, in a clear plastic baggy. He confiscated the glove. Inside were five small bindles containing a white powdery substance, a larger bag containing the white powdery substance and a $5 bill with the white powdery substance on it. The powdery substance was later determined to be cocaine. Officer McBride handcuffed and searched defendant and found five additional sandwich bags similar to those found inside the glove. Defendant was arrested, but Betancort was released after he was searched and nothing was uncovered. Minutes later, defendant's daughter, Maria Gonzalez (Maria), and her boyfriend drove down the alley. After his arrest, defendant admitted to Officer McBride possessing and selling cocaine.

A Los Angeles Police narcotics expert opined that defendant's location in an area known for nighttime drug sales, the quantity of drugs he possessed and the packaging of the drugs were consistent with possession of drugs for sale.

The defense's evidence

Maria testified on her father's behalf that on the night of his arrest, she was living with him. She arrived home with her boyfriend and parked near the carport. After she exited her car, a patrol car came by and parked in front of her. One of the officers told her to go inside. She saw nothing in defendant's hands while he was sitting. Neither he nor Betancort had gloves on, and she had never before seen defendant with the glove taken by the police. When Maria came back outside, defendant and Betancort were in handcuffs. She was told to return inside, and the police took defendant away in the police car.

Betancort also testified for defendant, whom he had known for 10 years. On the night in question, they were fixing the carport gate. A police car stopped in the alley, and the officers told him and defendant not to move. He and defendant were handcuffed, and the officers searched everywhere. Betancort never saw police recover a glove, nor had he ever seen the glove shown to him during trial.

Prior Appeal

Defendant's trial resulted in his conviction of possession of cocaine for sale. He filed the prior appeal from that conviction, contending, among other things not germane here, that the trial court deprived him of his rights to confront and cross-examine witnesses and to present a defense by refusing to allow him to call three witnesses to impeach the credibility of the arresting police officers. Two of those witnesses were purportedly going to testify to their being the victims of wrongdoing by Officer McBride in that he had planted evidence and testified falsely at a preliminary hearing. The third witness was purportedly going to corroborate a portion of the testimony of one of the other two witnesses.

We concluded that the trial court did not abuse its discretion in precluding the testimony of these witnesses, as they "lacked any indicia of credibility." One of the two witnesses who claimed to have been victimized by Officer McBride's wrongdoing never even filed a complaint against him, and both were ultimately convicted of the charges that resulted from the officer's alleged misconduct.

In the prior appeal, defendant also requested that we review the materials examined by the trial court at the in camera *Pitchess* hearing to determine whether all of the discoverable information had been disclosed to the defense. Upon doing so, we concluded that the trial court had abused its discretion in failing to order disclosure of information regarding two complaints made; one by Dwayne Johnson (Johnson) against Officers McBride and Moody and the other by Brian Lollar (Lollar) against Officer McBride.

Consequently, we affirmed the judgment and remanded the cause with directions that the trial court "provide defendant with the information required by this opinion and to conduct a hearing on whether defendant was prejudiced by the failure of the trial court to provide the information before trial. If prejudice is not demonstrated, the judgment shall stand affirmed. If defendant can demonstrate prejudice, the trial court shall set aside the judgment and order a new trial."

Remand

Motion for new trial

On remand, the trial court ordered that information regarding Johnson's and Lollar's complaints be provided to defense counsel. After reviewing the information provided, defense counsel filed under seal a motion for new trial, attaching as exhibits reports regarding the two newly discovered complaints. He argued that the facts presented in the reports reflected wrongful conduct by Officer McBride that was virtually identical to that which defendant claimed occurred in this matter (planting evidence and lying) and that defendant was prejudiced by not having had this information available to him at the time of trial.

Hearing on motion for new trial

At the hearing on the motion for new trial, only Johnson testified for the defendant. Two other witnesses, identified in the newly produced discovery as those who could corroborate Johnson's testimony, were out of state and unavailable. Lollar could not be produced for the hearing, although the defense investigator had a current address for him and tried to contact him. Lollar did not respond to these efforts. Based upon the

written report of Lollar's complaint, defense counsel argued that Lollar asserted that Officer McBride fabricated the police report by stating that Lollar threw cocaine to the ground when running from the officer, when Lollar only threw marijuana.

Johnson testified as follows: In May 2003, he left his brother and brother-in-law at his apartment and went to a mall. When he returned, he was confronted with a nine-millimeter Beretta pointed at him by Officer McBride, who was inside Johnson's apartment. Officer McBride told Johnson to "put [his] hands on [his] f-ing head and don't move." The officer handcuffed and searched Johnson, went through his pockets, removed some items and threw them to the floor. Johnson was then placed with his handcuffed brother and brother-in-law. While this was happening, Officer Moody sat in the living room "cracking jokes like it was funny."

Johnson asked Officer McBride as Officer McBride searched the apartment if he had a warrant. Officer McBride said that he did not need one. Officer McBride found $1,600 that Johnson had in a black jacket in his closet. The officer put the money in a red cigar box on a table and put the box in a Food-4-Less bag. Johnson asked Officer Moody for his money back. Officer Moody spoke with Officer McBride, and they counted out $662 which they stuck in Johnson's brother's back pocket. Then Officer McBride went outside with the Food-4-Less bag, leaving Officer Moody in the apartment with the three detainees. Officer McBride returned 10 minutes later without the Food-4-Less bag.

The officers took Johnson to the police station and told him he was arrested for possession for sale of "hard narcotics." Johnson denied having marijuana, cocaine or any drugs in the house. The officers never showed him any drugs or a search warrant. In court however, they claimed he had "hard narcotics."

The next day, Johnson was bailed out of jail and immediately reported the officers to internal affairs. He eventually received another $570 from "fraud and corruption." He never received all of the money the officers had taken from him.

Johnson only went to school through sixth grade and knew nothing about the law. He did not have any money to contest the charge. Because he faced a maximum sentence of 12 years, he pled guilty to possession of cocaine and was sentenced to a four-year

prison term. He served more than two years before being paroled. Johnson's criminal record included a conviction in 1986 of possession for sale of cocaine; in 1990 of possession of a dangerous weapon; in 1996 of possession for sale of cocaine; and later that same year, of carrying a loaded firearm in public; and in 1997 of possession for sale of marijuana.

The ruling

The trial court refused to revisit the issue of the propriety of excluding the defense witnesses at trial because that issue had been determined in the prior appeal. With regard to the claim of prejudice, the trial court stated: "The jury chose to believe the officers, of course. And you are absolutely correct, I mean, the issue was of credibility. The officers testified and the people testified on the defense side. Mr. Johnson, here, the court -- I have heard him. The most persuasive thing I think is that Mr. Johnson pled guilty to the charge, everything that he's complaining about that happened to him. This was planted, that this happened and that happened, his money was stolen, what's the end result? He pled guilty to the charge of possession for sale of cocaine and he went to prison for four years, served less than that time, because he had earned obviously some credits, but he received a four year sentence and he pled guilty to it. So that certainly affects his credibility as to whether or not the things that he's described here in court today happened or didn't happen. . . . So the other people here, they are not here. Their testimony -- I mean some statements were taken from them. There is no indication that any statements were taken under oath, under penalty of perjury, or anything like that. That's why I insisted on, on the testimony today to be taken under oath." The trial court noted that of the newly discovered witnesses only Johnson would be available if a new trial was granted, and he was not credible. It concluded: "I don't think that your client -- that you made a showing he was prejudiced by the denial of the discovery, and that, that the testimony of these people, even at the best, if they would all testify, would have affected the outcome of the trial. . . . So the motion for new trial will be denied. And the court will just order the judgment of conviction upheld."

DISCUSSION

I. Motion for new trial

Defendant contends that the trial court erred in denying his motion for new trial and concluding that he was not prejudiced by the belated production of discovery. He argues that a different result "may well have been achieved" if Johnson testified before a jury.

We review the trial court's denial of the motion for new trial under the abuse of discretion standard. (*People v. Navarette* (2003) 30 Cal.4th 458, 526.) "It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery." (*People v. Memro* (1985) 38 Cal.3d 658, 684.) We must consider whether, if defendant had been provided with the discovery before trial, there is a reasonable probability of a more favorable outcome. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 422; see also *People v. Marshall* (1996) 13 Cal.4th 799, 842.)

Here the trial court did not abuse its discretion in finding that it was not probable that had discovery relating to the Johnson and Lollar complaints been provided to defendant before trial, he would have obtained a more favorable outcome. First, assessment of credibility is the function of the trial court which had the opportunity to view Johnson testify and found him not credible. We give great deference to that finding. Second, as the trial court observed, Officers McBride's and Moody's credibility was challenged by other witnesses at trial, yet the jury believed the officers. Third, Johnson, who had a criminal record that included two other convictions for possession of cocaine for sale, was convicted of that same charge in connection with the arrest by Officers McBride and Moody during which the officers allegedly planted evidence. Johnson received a four-year prison term. It is unlikely that a jury would believe his testimony under these circumstances.

Further, there was no proof that the unavailability of the two witnesses who purportedly would corroborate Johnson's story was the result of the belated discovery. There is no indication in the record when these witnesses became unavailable. Were it before trial, their unavailability would not have been the result of the failure to provide

discovery in a timely fashion. Moreover, the two were Johnson's brother and brother-in-law, raising concerns of bias. Johnson's brother had a criminal record (Johnson testified that his brother was on parole) which calls into question his credibility. Thus, these corroboration witnesses, had they attended trial, would not likely have swayed the jury.

The second complainant, Lollar, did not attend the hearing. However, defense counsel thought he had an address for him but was unable to procure his attendance at the hearing because "there has been no response to visits and letters to the house and attempts to contact who lives there." Hence, there is no indication that Lollar is or was unavailable to testify at the hearing on the motion for new trial. The trial court only had before it a report relating to his claim that was not under oath and a witness who appeared unwilling to become involved.

We conclude that the foregoing supports the conclusion that it is not reasonably probable that had the discovery been provided in a timely manner, the results of the trial would have been more favorable to defendant.

II. Refusal to allow defense witnesses

Defendant contends that the trial court erred in refusing to allow him to call defense witnesses at trial to impeach Officers McBride and Moody, and thereby denied him his right to confront and cross-examine the witnesses against him and to present a defense. While defendant acknowledges that this issue was raised in the prior appeal and rejected, he argues "that the totality of the witnesses which the court did not allow to testify must be looked at anew because appellant was unaware of Johnson's complaint and was unaware of the others listed in the sealed documents at the time of trial." This contention is without merit.

We previously concluded that the trial court did not abuse its discretion in disallowing the testimony of three witnesses who would testify regarding alleged wrongdoing of Officer McBride and Moody because of the lack of credibility of those witnesses. The cumulative testimony of three or four additional incredible witnesses in no way strengthens defendant's claim. The argument is therefore rejected on the same grounds as set forth in our opinion in the prior appeal.

DISPOSITION

The order appealed from is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD